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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

MRS. ANNA L. GRAVES et al.,
Petitioners,
vs.
SPRINGFIELD GAS AND ELECTRIC COMPANY, a Corporation.

No. 194 .....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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The said petitioners on behalf of themselves individually, and as a class, prays that a writ of certiorari issue to review the declaratory judgment of said Supreme Court, en banc, denying the preferred stockholders in the Springfield Gas and Electric Company a premium of $15.00 per share.

OPINION BELOW.

The opinion of the Supreme Court of Missouri, en banc (the highest court in the state) was rendered on the 9th day of May, 1949. It is not officially reported (Supplemental Transcript in this Court p. 164). So much of the

opinion as relates to the federal question involved is contained pp. 170-171, 172 of the transcript of the proceeding in the Mo. Supreme Court. The pages of the original transcript in the court below are hereafter referred to as O. Tr. and the pages in the supplemental transcript for this court are hereafter referred to as S. Tr.

JURISDICTION.

The judgment of the Supreme Court of Missouri, en banc (the highest court in the state) was entered on the 9th day of May, 1949. S. Tr. p. 164. The motion for rehearing was overruled on the 13th day of June, 1949. S. Tr. p. ....

The jurisdiction of this court is invoked under the provisions of Section 237 (b) 240 (a) of the Judicial Code, as amended by the Act of Feb. 13, 1925. Also Act of March 8, 1934, Title 28, Sec. 344 (b) Judicial Procedure.

The petitioners claim is based on the sale by the Federal Light and Traction Company of all of the common stock of the Springfield Gas and Electric Company to enable the Federal Light and Traction Company to comply with an order of the SEC Commission under the Public Utility Holding Company Act of 1935, resulting in the liquidation of the said Springfield Gas and Electric Company by applying thereto the charter provision of the Springfield Gas and Electric Company instead of Section 11 (b) (2) of the Public Utility Holding Company Act of 1935, Title 15, Sec. 79k (b) (2), and denying to petitioners the title and right to $15.00 per share with interest specifically set up and claimed by the said petitioners under said Act. That the said Court has decided a federal question of substance not in accord with the applicable decisions of this Court.

QUESTIONS PRESENTED.

The parties involved are the Petitioners, who are the preferred stockholders as a class, the Federal Light and Traction Company, a holding company (hereinafter called Federal), who owned all of the common stock of the Springfield Gas and Electric Company (hereinafter called the Springfield Company), which company has been fully liquidated except as to the $15.00 per share, or $169,290, which is held for payment either to the preferred stockholders or to Federal, and the City of Springfield, Missouri a municipal corporation (hereinafter called the City), who makes no claim thereto.

The broad and controlling question in the case is whether the liquidation is governed by the charter provision of the Springfield Company so that Federal receives the $15.00 per share as a windfall, or whether it is governed and controlled by the Public Utility Holding Company Act so that the preferred stockholders will receive it.

The City under the Missouri Constitution and the decision of the Missouri Supreme Court in the Monday Case, which authorizes the City to enter into the Contract, Exhibit B, did not possess the capacity to subscribe for or become a stockholder in the Springfield Company so that the City bought the property of the Springfield Company and not its stock.

Does not the lack of capacity or power on the part of the City prevent the City from purchasing, or the Federal from selling its stock in the Springfield Company?

Is not Exhibit B, a single interrelated activity by which Federal was as firmly bound as the City, so the City could

not for the sole use and benefit of Federal use the charter provision of the Springfield Company to appropriate the $15.00 per share as a windfall to Federal?

Would not the legal effect have been the same if Federal under the order of the SEC Commission had itself dissolved the Springfield Company instead of contracting and requiring the City to do so for its sole use and benefit?

Does not Exhibit B (O. Tr. pp. 74-81) require the joint action of Federal and the City to dissolve and liquidate the Springfield Company?

Can Exhibit B be given the same legal effect as if the City had the capacity and means to purchase Federal's stock in the Springfield Company (and did so) so that Federal had no connection with the dissolution of the Springfield Company under its charter?

Or is the legal effect of Exhibit B the same as if the Federal had taken the necessary steps by stockholders' and directors' meetings to itself dissolve the Springfield Company and sold its property to the City?

Can the City use the charter provision of the Springfield Company to retire the preferred stock for the sole use and benefit of Federal and disregard the fact that it is stipulated that the Federal sold the stock of the Springfield Company by entering into the Contract, Exhibit B, to enable Federal to comply with the order of SEC in File No. 59-7?

The foregoing questions are so closely related as to constitute substantially the same question stated in a somewhat different form.

Can the instant case be distinguished from the case of Otis and Company v. SEC, 323 U. S. 624, as the Missouri

Supreme Court does, on the ground that it involved a plan under the Public Utility Holding Company Act?

If the Otis Case can be so distinguished, can the case of the North American Company v. SEC, 327 U. S. 686, be distinguished on the ground that it involved the review of orders of the SEC?

This too, although there was only one order in that case, which is identical with the order in the instant case with the sole exception of the dates and the names of the companies of which it was to divest itself of the ownership of the stock therein.

Is there any ambiguity, as the Missouri Supreme Court holds, in the second paragraph of Exhibit B (O. Tr., loc. cit. 75)?

Does it not require the retirement of the preferred stock at par, together with the applicable additional call price?

The last question is, if there is an ambiguity in Par. 2 of Exhibit B, does not Exhibit H, the Escrow Agreement (O. Tr. pp. 103-7, loc. cit. Pars. 2 and 3, p. 105), require the payment of the applicable additional call price to the preferred stockholders, for the reason that the Otis Case and the North American Company Case eliminates the payment of only the par value under the charter provision, and leaves only the applicable additional call price for the retirement of the preferred stock under Exhibit "H" and the Public Utility Holding Company Act.

STATEMENT.

The preferred stockholders have been paid the par value of their stock without waiving their right to receive a premium of $15.00 per share (Exhibit J, O. Tr. pp. 113-114).

The facts in the instant case are stipulated.

The charter provision, with reference to the redemption of the preferred stock, so far as applicable, contains the following:

> "At any time and from time to time, at the option of the Board of Directors, the Preferred Stock may be redeemed in whole or in part, on any date fixed for the payment of dividends on the Preferred Stock at the redemption price of One Hundred and Fifteen Dollars ($115.00) for each share of Preferred Stock redeemed," etc. (O. Tr., loc. cit. 46).

The liquidation provision in the event of dissolution so far as applicable, is as follows:

> "In the event of the dissolution, liquidation or winding up of the corporation, whether voluntary or involuntary, the holders of the Preferred Stock shall be entitled to be paid One Hundred Dollars ($100.00) per share, together with an amount equal to all dividends accrued thereon or in arrears (but without interest), before any amount shall be paid to the holders of the Common Stock and the holders of the Preferred Stock shall be entitled to no further payments or distribution. After such payment on the Preferred Stock the remaining assets shall be distributed pro rata among the holders of the Common Stock" (O. Tr., loc. cit. 48).

The order of the SEC is contained in Par. 15 (O. Tr., loc. cit. 55).

Under date of April 22, 1944, Federal entered into a contract with R. H. Teed of Hot Springs, Arkansas, providing, generally speaking, for sale of the fifty thousand (50,000) shares of the common stock of the Springfield Company to Teed subject to the conditions set forth in Exhibit A, par. 18 (O. Tr. p. 57).

The consideration recited in the Teed Contract, Exhibit A, for the stock is $650,000 (O. Tr. p. 65).

Par. 20 of the stipulation (O. Tr. p. 57), is as follows:

> "While said declaration or application for approval of said proposed sale to R. H. Teed was pending and undetermined, and under date of September 14, 1944, Federal and the City of Springfield, Missouri (hereinafter called 'the City'), executed and entered into a contract providing, generally speaking, for sale of the fifty thousand (50,000) shares of the common stock of the Springfield Company to the City, subject however to all of the terms, conditions and provisions of said contract, a true copy of which is hereto attached, identified as Exhibit 'B', and made a part of this stipulation by reference."

Par. 38 of the stipulation (O. Tr. p. 62), is as follows:

> "Federal sold the common stock of the Springfield Company to the City, in order to enable Federal to comply with the order of SEC in File No. 59-7, under date of August 17, 1943, hereinbefore quoted in paragraph 13 of this stipulation."

The sales and liquidation contract, Exhibit B (O. Tr. pp. 74 to 81), so far as applicable, omitting signatures, is as follows:

> "Agreement made this 14th day of September, 1944, between The City of Springfield, Missouri, and Federal

Light & Traction Company, a New York corporation (hereinafter called 'Federal').

"Witnesseth

"Whereas the City has offered to Federal the sum of Six Million Seven Hundred Fifty Thousand Dollars ($6,750,000) for the Springfield Gas and Electric Company, a Missouri corporation, with its properties as existing on July 31, 1944; and

"Whereas Federal has accepted said offer; and

"Whereas, it is desired to provide for the conditions which may arise pending the completion of such purchase and to make provision for the contingencies connected with said offer;

"Now, Therefore, It Is Agreed between the City and Federal as follows:

"First: The City shall take the necessary legal steps to authorize revenue bonds in at least the amount necessary to provide the purchase price as hereinafter specifically set forth. It is understood between the parties that a question has been raised as to the legal authority of the City to issue such revenue bonds for the purpose of carrying out this purchase, and the City agrees to take promptly in the courts of Missouri all reasonable steps as advised by its attorneys for the purpose of securing a declaratory or other proper judgment so that if such decision shall be favorable the said bonds may be sold. To the extent that the City may request it, Federal, through Springfield attorneys, whose fees shall be paid by Federal, will give its cooperation in presenting the matter to the courts for decision. Upon securing such favorable decision, the City agrees to take the proper steps to issue and sell promptly such revenue bonds in the amounts necessary to pay said purchase price.

"The City shall give to Federal five days' notice of a selected closing date, on which date, against payment therefor by the City of the Purchase price of $6,750,000 New York funds, the appropriate securities shall be delivered to the City or its representative.

"Second: It is understood that the balance sheet of Springfield Gas and Electric Company, attached hereto as Exhibit A, shows the assets and liabilities of said Company as of said July 31, 1944. At the time of closing there shall be deducted from such purchase price of $6,750,000 an amount equal to the preferred stock then outstanding and the first mortgage bonds then outstanding at the par or principal amounts thereof, respectively, together with the then applicable additional call prices unless prior thereto an order shall have been made by a competent authority permitting or requiring redemption of such securities or a part thereof without the payment of a premium in which latter case the deduction shall be in an amount in accordance with such order. There shall also be deducted from such purchase price all other items of expense incident to calling and retiring such preferred stock and such first mortgage bonds, including all accrued dividends and interest, cost of publishing any call notices that may be required and trustees' fees." • • •

"Third: At the time of closing there shall be paid by Springfield Company to Federal all federal income tax and excess profit taxes as accrued on the books of the Springfield Company at the date of the last closing of said books." • • •

"Eighth: It is agreed between the parties hereto that this contract shall become null and void, unless extended by the consent of both of the parties hereto,

unless the City of Springfield shall have secured the funds and set the date for closing prior to December 1, 1944."

"Ninth: This contract is subject to the securing of the approval thereto of any federal or state bodies having jurisdiction thereover."

"Tenth: At the time of closing all of the 50,000 shares of common stock of the Springfield Company shall be delivered, together with the resignations of all officers and directors of the Springfield Company, and in the interim no changes detrimental to the interests of the Springfield Company shall be made in any contracts or agreements regarding its services" * * * (Exhibit B, O. Tr. pp. 74-81).

Section 6 of Article IX of the Constitution of Missouri of 1875 provides, so far as applicable, as follows:

"Sec. 6. Municipalities not to subscribe to capital stock nor aid corporations or institutions.—No county, township, city or other municipality shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation or donation, or loan its credit to or in aid of any such corporation or association, or to or in aid of any college or institution of learning or other institution, whether created for or to be controlled by the State or others."

The Supreme Court of Missouri construed the constitutional provision, supra, in holding that the City had the power to purchase the property but not the stock.

Springfield Gas & Electric Company v. Monday, 353 Mo. 981, loc. cit. 992, par. 5.

"Respondents further contend that the City cannot purchase the common stock of Gas & Electric, citing

Section 6, Article 9, of the Constitution, prohibiting a city from becoming a subscriber to the capital stock of any corporation. However, it is clear that the City is not subscribing to the stock of Gas & Electric and becoming a part owner therein, but has contracted with Federal to buy all of its stock in order to become the owner of its physical utility properties and is purchasing this stock solely to acquire them. The ordinance provided for the immediate dissolution of Gas and Electric and is using this means of acquiring its properties because it can do so at much less cost in this way." * * *

Paragraph 15 of the stipulation (O. Tr. pp. 54 and 55) is as follows:

"In the Matter of Cities Service Power & Light Company and its Subsidiary Companies, Respondents, File No. 59-7, a proceeding instituted to bring about compliance with the provisions of Section 11 (b) (1) of the Holding Company Act, the Securities and Exchange Commission (hereinafter called 'SEC') handed down its findings, opinion and order on or about August 17, 1943. SEC then ordered, among other things:

"It Is Ordered that Federal Light and Traction Company shall sever its relationship with the companies named hereafter by disposing or causing the disposition, in any appropriate manner not in contravention of the applicable provisions of the said Act or the Rules and Regulations promulgated thereunder, of its direct and indirect ownership, control and holding of securities issued and properties owned, controlled or operated by the following companies:

Springfield Gas and Electric Company (and other companies named)."

The order in North American v. Securities & Exchange Commission, 327 U. S. 686, 709, is Release No. 3405, and is as follows:

> It Is Ordered, pursuant to Section 11 (b) (1): 1. That The North American Company, a registered public utility holding company, shall sever its relationship with the companies named hereafter by disposing or causing the disposition, in any appropriate manner not in contravention of the applicable provisions of the said Act or the Rules and Regulations promulgated thereunder, of its direct and indirect ownership, control and holding of securities issued and properties owned, controlled or operated by the following companies: (naming them)."

Plaintiff filed in the trial court a motion to dismiss defendants' counterclaim and alleged in Paragraph 3 the following ground therefor:

> "* * * that neither plaintiff nor the city now has or claims any beneficial interest in the fund and that no portion of the fund could in any event, be payable or paid to either plaintiff or the city."

SPECIFICATIONS OF ERRORS TO BE URGED.

The Supreme Court of Missouri erred:

1. In Holding that the Federal sold only the stock in the Springfield Company and not its property. Exhibit B, pp. 74-81.

2. In Holding that the Otis Case is distinguishable from the instant case because it involved a plan, and the North American Company Case because it "involved the review of orders of SEC."

3. In Holding that Par. 2 of Exhibit B, is ambiguous and does not provide for the retirement of the preferred stock at par, and the applicable call price.

4. In Holding that the preferred stockholders are not entitled to $115.00 per share under the Escrow Agreement, Exhibit H, O. Tr. p. 103-107.

REASONS FOR GRANTING THE WRIT.

The Missouri Supreme Court in the instant case has decided a federal question of substance not in accord with the applicable decisions of this Court. It has denied the preferred stockholders the call price of $115.00 per share, as provided in Exhibit B which is controlled by the Public Utility Holding Company Act of 1935, and not by the charter provision of the Springfield Company that was issued in 1927. That the stockholders at the time the charter was issued could not and did not have in mind the Public Utility Holding Company Act. That the question involved is a federal question of importance and the error of the court below should be corrected by this Court in the public interest.

> "The applicability of the charter provision under the Public Utility Holding Company Act of 1935 is a matter of federal law." Otis & Co. v. SEC, 323 U. S., loc. cit. 636.

1. Exhibit B.

There is no ambiguity in Exhibit B as to what the Federal sold and the City purchased. The Federal sold the property of the Springfield Company and not merely its stock. By the preamble of the Exhibit the City makes an offer to Federal to buy the property of Springfield for $6,750,000. The Federal accepts the offer. The considera-

tion of $6,750,000 is the consideration paid for the property and not the stock. The first paragraph requires the City to take the necessary steps to authorize the issuance of revenue bonds to provide the purchase price of the property and not the stock. The revenue bonds could be issued only against the income from the property and not the stock. It recites that the legal authority of the City to do so is doubtful. The Federal tenders the services of its attorneys to get the question settled by the Missouri courts. It provides for the payment by the City of the purchase price of $6,750,000 in New York Funds. The second paragraph provides for the deduction from the purchase price of an amount equal to the preferred stock then outstanding and the first mortage bonds then outstanding at par or principal amounts thereof, respectively, together with the applicable additional call prices unless prior thereto an order shall have been made by a competent authority permitting or requiring redemption of such securities or a part thereof without the payment of a premium. The eighth paragraph provides that the contract shall become null and void unless the City shall have secured the funds to enable it to purchase the property and not merely the stock. The tenth paragraph provides for the delivery of 50,000 shares of stock together with the resignations of all officers and directors of the Springfield Company, and that in the interim no changes detrimental to the interest of the Springfield Company shall be made in any contracts or agreements for their services. This clearly shows that the parties were dealing with the property and not merely the stock. It further shows that the Federal was an active participant and not merely selling the common stock in the Springfield Company, and wiping its hands of the transaction, so that it would be in no way connected with or a party to the dissolution and winding up of the Springfield Company. This Contract, Exhibit B, can bear no other construction, and the decisions of the Missouri Su-

preme Court that "Federal was enabled to comply with SEC's order by selling the stock to the City," entirely disregards the plain and unambiguous provisions of the contract and its legal effect. Exhibit B cannot be given the same legal effect as if Federal had sold its stock to the City, received the purchase price and had no connection whatever with the City's act in dissolving and liquidating the corporation. Under such state of facts Federal's only relation to the dissolution and liquidation would be that of a former stockholder. This is the legal effect of the decision of the Missouri Supreme Court in the instant case. The legal effect of Exhibit B is the same as if the Federal had itself dissolved and ilquidated the corporation and then sold the property to the City and used the charter provision to retire the preferred stock at par. It is certainly of no importance whether the City or the Federal took the necessary steps by stockholders' and directors' meetings to accomplish the dissolution and liquidation of the corporation. It was done for the joint benefit of both the City and Federal; to enable the City to acquire the property and not the stock; to enable the Federal to receive a much larger amount for its stock than it would have received if there was no dissolution, or about twice what it was willing to sell its stock to Teed for. It was done under and pursuant to the order of the Public Utility Holding Company Act of 1935, as stipulated in Paragraphs 20, O. Tr. p. 57 and 38, O. Tr. p. 62.

Exhibit B constitutes a single interrelated activity of both the City and Federal. So far as the question of whether the preferred stockholders shall receive only par under the Springfield Company's charter provision, or $115.00 per share under the Public Utility Holding Company Act of 1935 is concerned only Federal is interested in it. Neither the Springfield Company nor the City have a penny's interest in it. A very similar question was decided by this Court May 2, 1949—United

States v. Urbuteit, 335 U. S. ...., 67 S. Ct. Advance Sheet No. 14, p. 840.

2. The case of Otis & Company v. SEC, 323 U. S. 624, 650, cannot be distinguished from the instant case, as the Missouri Supreme Court attempts to do. The Otis Case announces two fundamental principles of law. First, that there is a plain distinction between a dissolution under the company's charter, whether voluntary or involuntary, and a dissolution and liquidation under the Public Utility Holding Company Act of 1935. Second, in proceeding under the Public Utility Holding Company Act of 1935, the securities of the dissolved and liquidated company can neither be increased nor diminished, which is the equivalent of holding in the instant case that the preferred stock whose value exceeds par cannot be retired at par under a charter provision providing for a dissolution and liquidation of the corporation.

The reasons assigned by the Court why the charter provision did not apply:

> "The selection by the Commission of one method of system adjustment to accomplish simplification rather than another is an incident which ought not to affect rights. The exercise of legislative power by Congress through Section 11 (b) (2) to accomplish simplification as a matter of public policy and the Commission's administration of the Act by dissolution of this particular company results in a type of liquidation which is entirely distinct from the liquidation of the corporation, whether voluntary or involuntary envisaged by the charter provisions of Power for preference to the senior stock." 323 U. S., loc. cit. 631.

The fact that in the instant case the SEC did not order a liquidation of the Springfield Company but only a sale by Federal of the stock of the Springfield Company does not

distinguish it. If Federal had merely sold the stock of Springfield there would have been no dissolution either under the charter or the Public Utility Holding Company Act. Federal did not merely sell the stock but pretended to do so when in fact it sold the property of Springfield to the City under the order of the SEC, and is undertaking to use the charter provision to retire the preferred stock under the charter provision that has no application. It is directly held in that case that the selection by the commission of one method of system adjustment to accomplish simplification rather than another is an incident which ought not to affect rights. On exactly the same principle the selection by Federal to sell the property and seek to use the charter provision to retire the preferred stock at less than its value, is as clearly contrary to the public policy of the Public Utility Holding Company Act as if it involved a dissolution under a plan. It results in a liquidation under the company's charter which is entirely distinct from the liquidation of the corporation under the Public Utility Holding Company Act of 1935. It results in the confiscation of $15.00 per share, which the preferred stockholders are entitled to under a dissolution to comply with the order of SEC under the Public Utility Holding Company Act, and in a windfall to Federal. Such a holding violates both of the fundamental principles announced in the Otis Case.

It is further said in that case:

> "We think, however, the charter provision is inoperative in simplification under Sec. 11 (b) (2). The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a simplification under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated liquidation within the meaning of Power's charter provision.

Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders. Nor should common stock values be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the devices of merger or consolidation, which would not run afoul of a charter provision formulated years before adoption of the Act in question" (loc. cit. 637, 638).

This is a distinct holding that Springfield's charter provision does not apply in the instant case. If Federal had merely sold the stock it owned in the Springfield Company it would not have run afoul of the dissolution and liquidation under the Public Utility Holding Company Act, but having sold not the stock but the property of the Springfield Company, the overriding policy required Federal to resort to the liquidation contract and pay the preferred stockholders the call price of $115.00 per share. Federal was prohibited from resorting to the charter provision that has no application to obtain a windfall of $15.00 per share. It could only acquire title to the property by a dissolution of the Springfield Company in order to convey it to the City. The dissolution had to be under the Public Utility Holding Company Act and not under the charter of the Springfield Company which has no application.

The Otis Case also emphasizes that values of the securities under a liquidation under the Public Utility Holding Company Act can neither be increased nor decreased.

It says:

"Of course, Congress would wish, in simplifying a holding company system capital structure, to preserve

values to investors, not to destroy them" (323 U. S. 624, loc. cit. foot p. 634).

The Otis Case further says:

> "The reason does not lie in the fact that the business of power continues in another form. This is true of bankruptcy and equity reorganization. It lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors. We must assume that Congress intended to exercise its power with the least possible harm to citizens" (323 U. S. 638).

This is a direct holding that the Otis Case applies where the Commission merely ordered a divesture of the stock owned by the Federal, and the Federal resorted to a liquidation of the Springfield Company and sold its property to the City for substantially double the amount that Federal was willing to sell the stock to Teed.

The case also calls attention to the fact that the "going concern" rule applies (323 U. S. 635). That when the President recommended the passage of the act he said: "that the pending holding company bill would not destroy legitimate business or wholesome and productive investment. It would not destroy a penny of actual value of those operating properties which holding companies now control and which holding company securities represent insofar as they have any value. On the contrary, it will surround the necessary reorganization of the holding company with safeguards which will in fact protect the investor" (323 U. S., loc. cit. 636).

The Otis Case points out very clearly that the Public Utility Holding Company Act of 1935 deals primarily with

the voting power of the corporation involved. That in the simplification of a corporation's voting power it deals only incidentally with the value of the securities involved without increasing or decreasing the value thereof.

The case of the North American Company v. The Securities and Exchange Commission, 327 U. S. 686, loc. cit. 709, 90 L. Ed. 645, l. c. 961, cannot be distinguished from the instant case. The order in the instant case is set forth in Par. 15 (O. Tr. p. 55). Also in statement, supra. The order in the North American Company Case is Release No. 3405, and is set forth in the statement, supra. The orders are identical with the exception of the names of the companies and the dates involved. The only function that the SEC was required to perform in the North American Company Case was to determine the qualifications of the purchasers of the stock sold under the order.

In the instant case the SEC Commission had no duty to perform after it made the order of disposition, for the reason that the City as a municipality was exempted from the Act. It possessed the capacity to purchase the property without the approval of the SEC. The City did not possess the capacity to purchase the stock as it could only do so to acquire title to the property. Neither the Commission nor the Public Utility Holding Company Act could confer the power upon the City to purchase the stock. Hence the Federal could not and did not sell the stock as such to the City. Of course if the City had possessed the capacity to purchase the stock from Federal and had done so, the fact that the City had thereafter dissolved and liquidated the corporation would not bring Federal back into the transaction so that the liquidation would be governed by the Public Utility Holding Company Act. The Missouri Court holds that the City was enabled to comply with SEC's order by selling the stock to the City. This holding disregards and ignores the plain provisions

of Exhibit B. It also disregards and ignores the entire reasoning of this Court in the Otis Case, and is in direct conflict with the North American Company Case. That the case directly holds that an order of the SEC that requires dumping, that materially affects the values of the securities sold, would be involved under the Public Utility Holding Company Act. On the same principle, to permit the Federal to use the charter provisions that has no application so as to retire the preferred stock at less than its value, would likewise be unlawful.

The Missouri Court, after erroneously holding that the city purchased the stock instead of the property, evidently realized that such holding is not justified, and then seeks to distinguish the Otis Case on the ground that the SEC had no jurisdiction to pass on a declaration or application for approval of the Contract, Exhibit B. This ignores the fact that it is the Public Utility Holding Company Act that governs whether the liquidation is under it, and not the order of the SEC. Neither can the Otis Case be distinguished for lack of a plan and certainly the North American Company Case cannot be so distinguished, as there was in fact no plan in that case.

No question of jurisdiction was involved in either case. Neither is there any question of jurisdiction involved in the instant case. The SEC had jurisdiction to make the order that it did make. It is stipulated that Exhibit B was made to carry out the order of the SEC, Par. 20 (O. Tr. p. 57), and Par. 38 (O. Tr. p. 62). The Federal sold the property and not the stock. It could only acquire the property by liquidation of the Springfield Company. The liquidation had to be under the Public Utility Holding Company Act to carry out the order of SEC, and could not be under the charter provision, as is directly held by both the Otis and North American Company cases.

3. The second paragraph of Exhibit B is copied in full in O. Tr. pp. 75 and 76, and also in the statement, supra, p. 6.

It contains the following:

> "At the time of closing there shall be deducted from such purchase price of $6,750,000 an amount equal to the preferred stock then outstanding and the first mortgage bonds then outstanding at the par or principal amounts thereof respectively, together with the then applicable additional call price unless prior thereto an order shall have been made by a competent authority permitting or requiring redemption of such securities or a part thereof without the payment of a premium in which latter case the deduction shall be in an amount in accordance with such order." * * *

No order was made.

By its express terms the transaction was to be completed at the time of closing.

The word "deducted" in the context in which it is here used means **paid** out of the purchase price. The context uses the words, permitting or requiring **redemption** of such securities, which certainly means the **payment** of such securities. It also contains the words, **payment of a premium.**

The terms used apply both to the mortgaged indebtedness and the preferred stock.

There is no suggestion that the payment to retire the preferred stock is to be the par value on the closing date, and the applicable additional call price at some indefinite future date, and subject to an entirely different condition.

By the terms of this paragraph **time** is of its essence, and by the terms of the entire Contract, Exhibit B, the

closing date is of its essence, as the City could only pay for the stock by acquiring title to the property, so as to issue and sell revenue bonds payable out of the income derived from the property.

The third paragraph of the contract also refers to what shall be paid at the time of closing. Hence it is plain that the word "**deducted**" in the context in which it is used, with reference to the "**redemption and payment of the securities,**" can have no other meaning than, that the "deduction" is made for the purpose of paying the amount deducted, and not to create a trust fund, as Exhibit H, the Escrow Agreement, seeks to do for future litigation between Federal and the preferred stockholders.

In the concluding part of the opinion in the instant case the court below holds that Federal had the right to have included in the Contract the terms of Exhibit H, the Escrow Agreement, and as it would have more efficiently protected the right of the Federal that was what they were trying to do when they wrote the second paragraph of Exhibit B, supra. This, too, although the second paragraph of Exhibit B contains no such provision, but an entirely different obligation. Paragraph 2, Exhibit B, shows on its face that up to the date of closing that Federal was willing to retire the preferred stock at par and the additional call price of $15.00 per share. The second paragraph of Exhibit B is the obligation and contract which the Supreme Court in the Monday Case (holding that the City had the capacity to purchase the property but not the stock) approved. It shows that Federal up to the closing date was willing to pay the call price. After the contract was approved, the bonds sold, and the $6,750,000 received by the City, it then occurred to Federal to change the obligation to retire the preferred stock at the call price by creating the Escrow Agreement, Exhibit H. It attempted to do so by disregarding the time provision which is of the essence

of the contract so as to give Federal a "windfall" of $15.00 per share. The court in the instant case, instead of enforcing the contract the parties made, has made a new contract for them which it thinks the parties should have made.

It is important to keep in mind that neither the City nor the liquidated Springfield Company has any pecuniary interest in the $15.00 per share. This is shown by the motion to dismiss the counterclaim, by Exhibit B and the Escrow Agreement, Exhibit H. The $15.00 per share goes either to Federal or the preferred stockholders.

4. Exhibit H, the Escrow Agreement, in Paragraph 2 (O. Tr. p. 105), provides:

> "In the event that a court having jurisdiction shall make a final determination on or before March 26, 1947 that a premium of $15.00 per share is payable to the preferred stockholders of Springfield * * * The escrow agent unless otherwise ordered by said court shall immediately pay over to a liquidating agent, which shall be Industrial Trust Company of Providence, Rhode Island if it be willing to Act" * * * (O. Tr. p. 105).

Par. 3 (O. Tr. p. 105) is as follows:

> "In the event that a court having jurisdiction shall make a final determination at any time prior to March 26, 1947 that no premium is payable to said preferred stockholders the escrow agent shall forthwith pay to Federal said sum of $169,290." (There is a provision for extending the date.) (O. Tr. p. 105.)

Under this Escrow Agreement, either the preferred stockholders are to be paid a premium of $15.00 per share, or the Federal is to be paid $169,290 under the charter

provision for the liquidation of the preferred stock at par. The decisions in the Otis Case and the North American Company Case, discussed in Paragraph 2, supra, directly held that the Federal cannot be paid the $169,290, or $15.00 per share under the charter provision. This leaves only the provision for the payment of $15.00 per share to the preferred stockholders under the dissolution and liquidation contract, Exhibit H, the Escrow Agreement, and the Public Utility Holding Company Act of 1935. In other words, even if there is an ambiguity in the second paragraph of Exhibit B, which the lower court thought it discovered, the $15.00 per share is still due and payable to the preferred stockholders under the decisions of this Court, supra.

The reason assigned by this Court in the cases, supra, that the charter provision does not apply, is that the Public Utility Holding Company Act could not have been in the mind of the parties in 1927 when the charter was issued. The Escrow Agreement was in the mind of the parties and made for the express purpose of seeking to change Paragraph 2 of Exhibit B so that Federal instead of the preferred stockholders will receive the $15.00 per share.

On June 27, 1949, since the opinion by the Supreme Court of Missouri, this Court has exhaustively reconsidered the Public Utility Holding Company Act and the Otis Case. It involved the reorganization of the Engineers Public Service Co. The title is—S. E. C. v. Central Illinois Corp., not yet reported in the Advance Sheets. The case considers and decides a number of questions not involved in the instant case. It decided one question, which is equally applicable to the instant case. The manifest solvency of the liquidated corporation in that case, as well as the Otis Case and the instant case, simplifies the problem of the stockholders' rights.

It also holds:

> "When it became apparent the going-concern value would exceed the call prices of the stocks by a considerable amount, the exact going-concern value became immaterial, because the call price, at which the corporation could always retire the preferred without reference to the Act, marked the limits of the preferreds' claims."

So that as a matter of law the preferred stockholders became entitled to the call price. The only difference between that case and the instant case is, that in the instant case on account of the death of the Court Reporter the oral testimony taken in the trial court was omitted by agreement of counsel for the plaintiff and defendants as being immaterial, irrevelant and unnecessary on the appeal (O. Tr. p. 129).

In that case the rights of the preferred stockholders to the call price is based on the fact that the preferred stockholders there, as in the instant case, were to be paid for their stock in cash, and not in securities of equal value, and was based upon a finding of the S. E. C. Commission, which neither the District Court nor the Court of Appeals could set aside or modify. In the instant case the stockholders' rights are not based on a finding of the Commission but upon the liquidation agreement, which the Federal entered into so that it could receive a much larger amount for its common stock than it was willing to sell the stock to Teed for. The preferred stockholders in the instant case are entitled as a matter of law to the call price, both under Section 2 of Exhibit B (O. Tr. p. 74), as well as under the Escrow Agreement, Exhibit H (O. Tr. p. 105). Hence for the same reason that, in that case the exact going-concern value became immaterial, it is equally immaterial in the instant case whether the investment value

of the preferred stock is in fact less or exceeds the call price. The call price controls in the instant case, not because of the charter provision that was promulgated in 1927, but by reason of the fact that the liquidation contract adopts the call price as the value of the stock, both under Section 2 of Exhibit B, and the Escrow Agreement, Exhibit H (O. Tr. p. 105).

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 194.

MRS. ANNA L. GRAVES ET AL., PETITIONERS,

VS.

SPRINGFIELD GAS AND ELECTRIC COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

Petitioners invoke the jurisdiction of this Court (Pet. 2)[1] "under the provisions of Sections 237(b) 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. Also Act of March 8, 1934, Title 28, Section 344(b) Judicial

[1]As used herein, "Pet." refers to "Petition for Writ of Certiorari to the Supreme Court of Missouri." "R." refers to the printed "Transcript of Record."

Procedure." Said Section 240 of the Judicial Code was Title 28, Section 344, so two of petitioner's citations are to the same statute. Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347) dealt only with review of judgments of Circuit Courts of Appeal and the Court of Appeals of the District of Columbia. In this case, petitioner seeks a writ of certiorari to review a judgment of the Supreme Court of Missouri, and Section 240 of the Judicial Code could have had no possible application.

However, both Sections 237 and 240 of the Judicial Code were repealed by the Act of June 25, 1948. Title 28, United States Code, Section 1257, presently governs review by this Court of final judgments of state courts.[2]

Under the heading of "Jurisdiction," petitioners assert [in an effort to bring their petition within Rule 38, Paragraph 5(a), of the Rules of this Court[3]] that the Supreme

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[2]"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." Title 28, United States Code, Section 1257.

[3]"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Rule 38, Pars. 5 and 5(a), Rules of Supreme Court of the United States.

Court of Missouri "has decided a federal question of substance not in accord with the applicable decisions of this Court."

However, as we believe will be apparent from the record and the opinion of the Supreme Court of Missouri, and as will be discussed *infra*, there has been and is no "federal question of substance" in this case, and the opinion of the Supreme Court of Missouri is not in conflict with the decisions of this Court.

STATEMENT OF THE CASE.

The opinion of the Supreme Court of Missouri (R. 164-172) contains a comprehensive review of the pertinent facts. This action was instituted on April 7, 1945, by Springfield Gas and Electric Company, a Missouri corporation (hereinafter called "the Springfield Company"), in the Circuit Court of Greene County, Missouri, a court of "exclusive original jurisdiction in all civil cases * * * not otherwise provided for by law" (Sec. 2100, R. S. Mo., 1939), for the purpose of obtaining under the Missouri Declaratory Judgment Act[4] a determination and declara-

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[4]"The circuit courts and courts of common pleas of this state, within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." Sec. 1126, R. S. Mo., 1939.

"Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute,

tion of the rights of the preferred stockholders of the Springfield Company upon "dissolution, liquidation or winding up of the corporation" (see plaintiff's "Amended Petition," R. 2-7).

Plaintiff-respondent has asserted that, under the dissolution provision in the Articles of Agreement of the Springfield Company (R. 47-48), the preferred stockholders of the Springfield Company are entitled to receive $100.00 per share. Certain of the preferred stockholders, petitioners herein, have contended that, under the call provision in said Articles of Agreement (R. 46), they are entitled to receive $115.00 per share.

From 1927 to March 26, 1945, the Springfield Company owned and operated certain utility properties in and adjacent to the City of Springfield, Missouri. *"The Springfield Company has been at all times an operating company and has never been a utility holding company within the meaning of the Public Utility Holding Company Act of 1935"* (Par. 11, R. 53).

Prior to March 26, 1945, the Springfield Company was a subsidiary of Federal Light and Traction Company (hereinafter called "Federal"), which, in turn, was controlled by Cities Service Power & Light Company. Both Federal and Cities Service were registered holding companies under the Holding Company Act (Pars. 13-14, R. 54).

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ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." Sec. 1127, R. S. Mo., 1939.

"The enumeration in Sections 1127, 1128 and 1129 does not limit or restrict the exercise of the general powers conferred in Section 1126, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty." Sec. 1130, R. S. Mo., 1939.

In a proceeding then pending before the Securities and Exchange Commission (hereinafter called "SEC"), styled *"In the Matter of Cities Service Power & Light Company and Its Subsidiary Companies, Respondents,"* a proceeding to bring about compliance with the provisions of Section 11(b)(1) of the Holding Company Act [15 U. S. C. A., Sec. 79k(b)(1)], SEC ordered, among other things, under date of August 17, 1943 (R. 55):

> "It Is Ordered that Federal Light & Traction Company shall sever its relationship with the companies named hereafter by disposing or causing the disposition, in any appropriate manner not in contravention of the applicable provisions of the said Act or the Rules and Regulations promulgated thereunder, of its direct and indirect ownership, control, and holding of securities issued and properties owned, controlled, or operated by the following companies: Springfield Gas and Electric Company (and other companies named)."

In the "Findings and Opinion" handed down with the quoted order, SEC stated, among other things (R. 56):

> "Sale is only one of the many means of divestiture which may be used in compliance with orders of disposition."

On September 14, 1944, Federal and the City entered into a written contract (hereinafter called "the sale agreement") providing, generally speaking, for purchase by the City of the Springfield Company with its properties as existing on July 31, 1944 (Ex. B; R. 74-81). The City was to obtain, and subsequently did obtain, the required funds by issuance of revenue bonds which were validated by the Supreme Court of Missouri in *City of Springfield* v. *Monday*, 353 Mo. 981, 185 S. W. 2d 788.

On the closing date under the sale agreement, *i. e.*, on March 26, 1945, all of the 50,000 shares of the common stock of the Springfield Company were assigned, transferred and delivered to the City, and the stock was immediately reissued to the City (Par. 25, R. 59). Thereafter, at a special meeting of the Board of Directors of the Springfield Company on March 26, 1945, the old directors resigned and new directors, all of whom were officials of the City, were elected and qualified (Ex. D; R. 85-90).

Thereafter, on the same date, corporate dissolution of the Springfield Company was authorized and directed at special meetings of the Board of Directors and stockholders (Exs. E and F; R. 90-93), and appropriate provision was made for redemption of outstanding bonds, retirement of preferred stock, and conveyance of the properties of the Springfield Company to the City (Ex. G; R. 96-103). On the same date, the Springfield Company, the City, Federal and the First National Bank of Kansas City (as escrow agent) entered into an escrow agreement under which $169,290.00 was deposited with the escrow agent, that being the equivalent of $15.00 per share upon the outstanding 11,286 shares of preferred stock of the Springfield Company (Ex. H; R. 103-107).

The Board of Directors of the Springfield Company (then officials of the City) authorized and directed institution of this action for declaratory judgment on April 7, 1945 (Ex. K; R. 117-120).

It was stipulated that "Federal sold the common stock of the Springfield Company to the City, in order to enable Federal to comply with the order of SEC" hereinbefore quoted (Par. 38, R. 62). It was agreed also that (Par. 22, R. 57-58):

"No declaration or application for approval of the contract between Federal and the City, dated September 14, 1944, * * *, or for approval of the proposed sale of the common stock of the Springfield Company thereunder, was filed with SEC at any time, no such declaration or application for approval being necessary by reason of the exemption granted by Rule U-44(b)(3) of the General Rules and Regulations of SEC."

The sale agreement between Federal and the City (Ex. B; R. 74-81) was never presented to or considered by SEC; and, SEC made no order or finding with respect to the sale by Federal to the City, the corporate structure of the Springfield Company, liquidation or dissolution of the Springfield Company, retirement of its preferred stock, or the "investment value" of such preferred stock. Furthermore, the record in this case does not indicate whether either Cities Service or Federal ever filed a plan under Section 11(e) of the Holding Company Act [15 U. S. C. A., Sec. 79k(e)]; or, if such plan was filed, what its provisions may have been or what action SEC may have taken with respect thereto. And, as the Supreme Court of Missouri pointed out, the record reflects no objection or complaint about the order of SEC entered on August 17, 1943 (R. 55), which was directed to Federal only, and which required Federal to "sever its relationship with (Springfield Gas and Electric Company) by disposing or causing the disposition, *in any appropriate manner* * * * of its direct and indirect ownership, control, and holding of securities issued and properties owned, controlled, or operated" by the Springfield Company (italics ours).

There is no evidence in the record concerning "the investment value" of the preferred stock of the Spring-

field Company at any given time, or concerning the market history of the stock.

The Supreme Court of Missouri found that the preferred stockholders were entitled to $100.00 per share under the dissolution provision in the Articles of Agreement of the Springfield Company (R. 47), and ordered that a declaratory judgment to that effect be entered in the trial court.

ARGUMENT.

Before this Court will review a decision of a state court, it must affirmatively appear from the record that a federal question was presented to and decided by the state court, and that decision of the federal question was necessary to determination of the cause. *Williams* v. *Kaiser,* 323 U. S. 471, 477, 65 S. Ct. 363, 89 L. Ed. 398, 403; *Southwestern Bell Telephone Company* v. *Oklahoma,* 303 U. S. 206, 212, 58 S. Ct. 528, 530, 82 L. Ed. 751. Of course, we recognize that whether these jurisdictional requirements have been met is itself a federal question, which this Court will determine. *Honeyman* v. *Hanan,* 300 U. S. 14, 18, 57 S. Ct. 350, 352, 81 L. Ed. 476. However, we are confident that an examination of the record in this case will impel the same conclusion reached by the Supreme Court of Missouri, *i. e.,* "that there is no question of a federal cause of action here involved" (R. 171).

Petitioners' position will best be apparent from an examination of the record. In their "Amended Answer and Counterclaim" (R. 9-25), defendants-petitioners advanced three separate and distinct theories upon which they sought to recover the call premium of $15.00 per share, to-wit:

1. That "there is an ambiguity between the winding up provision and the call provision in the said stock certificates and said articles of agreement," and that "on account of such ambiguity * * * the call provision and not the winding up provision, governs and controls the rights of the preferred stockholders" (Par. 7, R. 12). This "theory of ambiguity" was abandoned in the Supreme Court of Missouri.

2. "That *the City* became and was bound by the terms of said contract (the sale agreement) to withhold, and did withhold, a sum sufficient * * * to pay all of the holders of said preferred stock the sum of $115.00 per share"; "that the duty of *the City* to do so was definitely and finally fixed under the terms of said contract" (R. 17); that neither the City nor Federal nor the Springfield Company "was authorized to change or alter said contract without the knowledge and consent of the said preferred stockholders for whose use and benefit said contract was made with reference to the payment of said preferred stock"; but, "that notwithstanding the duty on the part of the said City under the sales contract to pay the said preferred stockholders $115.00 per share for said stock," the sum of $169,290.00 "was in fact unlawfully and without any authority placed in escrow by the said City of Springfield out of the purchase price which it had withheld to pay the said preferred stockholders under the terms of said contract" (R. 18). In other words, defendants-petitioners asserted that the sale agreement was made by Federal and the City for the express use and benefit of the preferred stockholders of the Springfield Company, and that they were entitled to recover as third-party beneficiaries. This was petitioners' so-called "state cause of action based on the provisions of the second paragraph of Exhibit B as made for their use and benefit" (R. 169). This theory was considered and ruled adversely to petitioners by the Supreme Court of Missouri (R. 171-172).

3. That "the question as to whether the sale of the properties under said contract to the City * * * is governed by the Federal Utility Holding Company Act, is a federal and not a state question, and * * * it has been directly held by the Supreme Court of the United States that said Act, and not the dissolution provision in the plaintiff's charter,

controls the rights of the preferred stockholders in the instant cause" (R. 23). It is significant that, when defendants-petitioners filed their "Amended Answer and Counterclaim" in the Circuit Court, they were of the opinion that, under their so-called "federal cause of action," "said stock is to be valued at its *fair and equitable value*," which they then averred to be $115.00 per share or more (R. 23). However, defendants-petitioners subsequently, but prior to determination of the case in the trial court, amended their "Amended Answer and Counterclaim," as to their so-called "federal cause of action," and alleged that the sale agreement "*by its express terms fixes and determines the value of the preferred stock at $115.00 per share*" (R. 130).

As stated in the opinion of the Supreme Court of Missouri, defendants there contended that they had "a federal cause of action based on the Public Utility Holding Company Act of 1935 *and Exhibit B* (the contract between Federal and City dated September 14, 1944)" (R. 169).

In their petition to this Court, petitioners have, for the first time, "expanded" this theory by asserting (Pet. 26-27) that they are entitled to the call premium under the escrow agreement also (Ex. H; R. 103-107), but it is still apparent that petitioners' so-called "federal cause of action" depends upon a contract alleged to have been made for their use and benefit as third-party beneficiaries, *i. e.*, either upon the sale agreement (Ex. B; R. 74-81) or upon the escrow agreement (Ex. H; R. 103-107).

We have searched the petition for writ of certiorari in a vain effort to find some statement of the federal question claimed to have been submitted to and decided by the Supreme Court of Missouri. The nearest approach to a statement of the alleged "federal question" appears to be the following (Pet. 13):

"The Missouri Supreme Court in the instant case has decided a federal question of substance not in accord with the applicable decisions of this Court. It has denied the preferred stockholders the call price of $115.00 per share, *as provided in Exhibit B* which is controlled by the Public Utility Holding Company Act of 1935, and not by the charter provision of the Springfield Company that was issued in 1927."

A somewhat similar statement appears under "Jurisdiction."[5] But, irrespective of the language in which petitioners may present their claim, the fundamental fact remains that, in the final analysis, petitioners are relying upon a contract, *i. e.*, either upon the sale agreement or upon the escrow agreement. That would seem to be plain from several statements in their petition.[6]

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[5]"The petitioners' claim is based on the sale * * * *of all of the common stock* of the Springfield Gas and Electric Company to enable the Federal * * * to comply with an order of the SEC Commission * * * resulting in the liquidation of the said Springfield Gas and Electric Company by applying thereto the charter provision of the Springfield Gas and Electric Company instead of Section 11(b)(2) of the Public Utility Holding Company Act of 1935, Title 15, Section 79k(b)(2), and denying to petitioners the title and right to $15.00 per share with interest specifically set up and claimed by the said petitioners under said Act" (Pet. 2).

[6]"* * * the overriding policy (of the Holding Company Act) required Federal to resort to the liquidation contract (Ex. B; R. 74-81) and pay the preferred stockholders the call price of $115.00 per share" (Pet. 18).

"This leaves only the provision for the payment of $15.00 per share to the preferred stockholders under the dissolution and liquidation contract, Exhibit H, the escrow agreement, and the Public Utility Holding Company Act of 1935" (Pet. 25).

"The preferred stockholders in the instant case are entitled as a matter of law to the call price, both under Section 2 of Exhibit B, as well as under the escrow agreement, Exhibit H" (Pet. 26).

"The call price controls * * * by reason of the fact that the liquidation contract adopts the call price as the value of the stock, both under Section 2 of Exhibit B, and the escrow agreement, Exhibit H" (Pet. 27).

It is apparent that petitioners recognize that, even under their so-called "federal cause of action," proof of the value of the preferred stock of the Springfield Company would be essential. There is no evidence in the record as to the "investment value" of the preferred stock. However, in the Supreme Court of Missouri, the theory of defendants-petitioners was that such proof of value was supplied by the sale agreement (Ex. B; R. 75); and, in their petition for writ of certiorari, their theory seems to be that such proof of value is supplied either by the sale agreement or by the escrow agreement (Ex. H; R. 105). In either event, petitioners' so-called "federal cause of action" would rest upon construction of a contract and would present no federal question.

Petitioners charge, no less than eleven times, that the City purchased from Federal the properties of the Springfield Company, and not its common stock. The record does not support petitioners. It is true that, as the Supreme Court of Missouri observed in the proceeding to validate revenue bonds (*City of Springfield* v. *Monday*, 353 Mo. 981, 185 S. W. 2d 788) the City "contracted with Federal to buy all of its stock in order to become the owner of its physical utility properties and is purchasing this stock solely to acquire them." However, although the City's ultimate purpose was acquisition of the properties of the Springfield Company, the fact remains that the City contracted to purchase, and did purchase, the common stock of the Springfield Company. The first transaction on the closing date under the sale agreement, *i. e.*, on March 26, 1945, was the transfer of the common stock of the Springfield Company from Federal to the City (R. 59, 84), and immediate reissuance of that stock to the City (R. 59). Federal did not participate thereafter in any action taken by the Springfield Company or by the City (Pars. 26-34, R. 59-61).

The parties stipulated in the trial court that "*Federal sold the common stock of the Springfield Company to the City*, in order to enable Federal to comply with the order of SEC * * * of August 17, 1943" (Par. 38, R. 62), and the record clearly shows that the common stock, and not the properties, of the Springfield Company was sold. Counsel for petitioners themselves admit that, if Federal sold the common stock of the Springfield Company to the City, the preferred stockholders would have no right to claim the call premium.[7]

However, it would be equally immaterial whether Federal had sold the common stock or the properties of the Springfield Company. Certain indisputable facts, which are reflected affirmatively by the record, demonstrate that petitioners could have no cause of action under the Holding Company Act. It stands admitted that SEC had no jurisdiction over the sale by Federal to the City, and that said transaction was never submitted to or considered by SEC (Par. 22, R. 57). When Federal sold and transferred the common stock of the Springfield Company to the City on March 26, 1945, the Springfield Company ceased to be an operating subsidiary of a registered holding company, and SEC thereafter did not have even indirect jurisdiction or control over the Springfield Company.

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[7] "If Federal had merely sold the stock of Springfield there would have been no dissolution either under the charter or the Public Utility Holding Company Act" (Pet. 17).

"If Federal had merely sold the stock it owned in the Springfield Company it would not have run afoul of the dissolution and liquidation under the Public Utility Holding Company Act * * *" (Pet. 18).

"Of course if the City had possessed the capacity to purchase the stock from Federal and had done so, the fact that the City had thereafter dissolved and liquidated the corporation would not bring Federal back into the transaction so that the liquidation would be governed by the Public Utility Holding Company Act" (Pet. 20).

SEC made no order pertaining to the corporate structure of the Springfield Company, its liquidation or dissolution, or retirement of its preferred stock. Likewise, SEC never undertook to fix, declare, determine or pass upon the "investment value" of the preferred stock of the Springfield Company, and no one sought any such determination of value by SEC. The order of SEC dated August 17, 1943 (R. 55), went no further than to direct Federal to "*sever its relationship* (with the Springfield Company) * * * *in any appropriate manner*," and SEC plainly stated (R. 56) that "sale is only one of the many means of divestiture which may be used in compliance with orders of disposition." Accordingly, Federal was not directed or required to sell either the common stock or the properties of the Springfield Company. Federal *might* have chosen to have "severed its relationship" with the Springfield Company by some other of "the many means of divestiture."[8] SEC made no order which, by the remotest stretch of imagination, could be said to have required retirement of the preferred stock of the Springfield Company at any time or at any price, either by Federal or by the City.

Furthermore, the sale agreement between Federal and the City did not require the City, after acquisition of the common stock from Federal, to dissolve the Springfield Company. That followed for another and entirely different reason, *i. e.*, because the City, although permitted to acquire the common stock of the Springfield Company to reach a desired end, could not operate a private corporation. However, by the sale agreement Federal did not undertake to liquidate or dissolve the Springfield

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[8]For example, the common stock of the Springfield Company might have been distributed by Federal as a dividend to its (Federal's) stockholders, which has been the method of divestment followed by a number of utility holding companies.

Company and assumed no obligation with respect thereto. The contract of September 14, 1944 (Ex. B; R. 74-81), to which petitioners now refer as "the liquidation contract" (R. 18, 27), "the dissolution and liquidation contract" (R. 25), or "the liquidation agreement" (R. 26), was nothing more nor less than a contract of sale or sale agreement. Counsel for defendants-petitioners were content to refer to the contract in the same manner in their "Amended Answer and Counterclaim" (R. 9-25).

The salient and controlling fact, as to petitioners' so-called "federal cause of action," is that there has been no proceeding under the Holding Company Act with respect to the corporate structure of the Springfield Company, its liquidation or dissolution, retirement of its preferred stock, or the "investment value" of such preferred stock, and that there has been no hearing before SEC, and therefore no finding by SEC, with respect to any of those matters. Petitioners rely principally upon two cases, *Otis & Co.* v. *SEC*, 323 U. S. 624, 89 L. Ed. 511, and *North American Co.* v. *SEC*, 327 U. S. 686, 90 L. Ed. 945. The distinctions between those cases and the instant case were pointed out in the opinion of the Supreme Court of Missouri (R. 170-171). In the Otis case, a plan for distribution of the assets of United Light and Power Company was submitted to SEC and was approved, as modified, after examination and hearing. Thereafter, SEC "directed counsel for the Commission to apply to an appropriate federal court for an order enforcing the Plan." 323 U. S. l. c. 627, 89 L. Ed. l. c. 516. SEC had found that the plan, as approved, was "fair and equitable" to all security holders. This finding was affirmed by the courts upon review in the manner provided in the Holding Company Act [15 U. S. C. A., Sec. 79k(e)].

In the *North American case, supra,* this Court was passing, for the first time, upon the constitutionality of Section 11(b)(1) of the Holding Company Act [15 U. S. C. A., Sec. 79k(b)(1)]. As the Court said, "Only these constitutional issues are now before us." 327 U. S. l. c. 690, 90 L. Ed. l. c. 950. Petitioners emphasize that the order of SEC dated August 17, 1943, directed to Federal (R. 55), and the order of divestment directed to North American Company were in almost identical language. However, counsel for petitioners conveniently ignore the fact that, in both the Otis and North American cases, the federal courts were considering, upon review as provided by the Holding Company Act, certain orders of SEC, the administrative agency vested with original jurisdiction under the Holding Company Act and charged by the Congress with the duty of making the investigation and determination contemplated by Sections 11(b)(1) and 11(b)(2) of the Act [15 U. S. C. A., Secs. 79k(b)(1) and 79k(b)(2)], whereas the instant case is an action for declaratory judgment instituted in a state court of original jurisdiction and does not involve review, either under Section 11(e) or under Section 24(a) [15 U. S. C. A., Sec. 79x(a)], of any order or finding by SEC.

Counsel for petitioners also cite, but significantly in incidental fashion, the very recent and exhaustive opinion by Mr. Justice Rutledge in *SEC* v. *Central-Illinois Securities Corporation,* 93 L. Ed. 1291 (June 27, 1949; Adv. Sheet No. 17). As in the *Otis* and *North American cases, supra,* the Central-Illinois case involved an amended plan filed under Section 11(e) of the Holding Company Act. The question was stated, in the first paragraph of the opinion (93 L. Ed. l. c. 1295), as "whether the Securities and Exchange Commission, in reviewing the plan, correctly applied the 'fair and equitable' standard of Section

11(e) in determining the amounts to be paid the preferred stockholders in satisfaction of their claims." The proceedings before SEC were reviewed at some length (93 L. Ed. l. c. 1296-1300), and the Court noted the character and scope of investigation made by SEC, the testimony offered, and the conclusions reached.

One of the major issues in the Central-Illinois case was as to the scope of review to be exercised by a district court in reviewing a plan theretofore submitted to and approved by SEC. This Court called attention (93 L. Ed. l. c. 1307) to the fact that an analogy drawn by the Court of Appeals "from the history of the law of reorganization in general is highly indiscriminate," in that "it ignores the important fact that in such proceedings there is no effort to brigade the administrative and judicial processes," as there is in proceedings instituted by SEC under the Holding Company Act. The Court's conclusion on the issue raised concerning the scope of judicial review[9] was that findings of SEC as to valuation "are not subject to reexamination by the Court unless they are not supported

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[9]"Indeed we think it is fair to conclude that the primary object of Section 11(e) [15 U. S. C. A., Sec. 79k(e)] was not to provide a highly different scope of judicial review from that afforded by Section 24(a) [15 U. S. C. A., Sec. 79x(a)], but was to enable the Commission, by giving it the authority to invoke the Court's power, to mobilize the judicial authority in carrying out the policies of the Act." *SEC* v. *Central-Illinois Securities Corp.*, 93 L. Ed. l. c. 1308.

"We do not think it [Sec. 11(e)] was intended to define with accuracy the scope of review to be exercised over matters committed to the Commission's discretion and expert judgment, not involving questions of law, or to set up a different and conflicting standard in those matters from the one to be applied in proceedings under Section 24(a)." *Ibid.*, l. c. 1308.

by substantial evidence or were not arrived at 'in accordance with legal standards.' "[10]

The doctrine of "equitable equivalents" first announced in the *Otis case, supra,* was recognized and reaffirmed in the Central-Illinois case. However, it would seem to be plainly apparent, from all of the reported cases as well as the Holding Company Act, that application of the doctrine of "equitable equivalents" must be confined to situations in which SEC, in the proper assumption of jurisdiction conferred under the Holding Company Act, has exercised its discretion and expert judgment and has made a finding as to "fair and equitable" value, "after notice and opportunity for hearing." In the case at bar, there was no finding by SEC as to the "investment value" of the preferred stock of the Springfield Company, and no order pertaining to such preferred stock.

Furthermore, Section 11(b)(2) of the Holding Company Act[11] specifically limits the authority of SEC to re-

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[10]"Accordingly we are unable to accept the conclusion of the Court of Appeals and the District Court that the latter was free in passing upon the Commission's valuations to disregard its judgment in the large areas of discretion committed by the Act to that judgment.

"Administrative finality is not, of course, applicable only to agency findings of 'fact' in the narrow, literal sense. The Commission's findings as to valuation, which are based upon judgment and prediction, as well as upon 'facts,' like the valuation findings of the Interstate Commerce Commission * * *, are not subject to re-examination by the court unless they are not supported by substantial evidence or were not arrived at 'in accordance with legal standards.' " *Ibid.*, l. c. 1309.

[11]That portion of Section 11(b)(2) of the Holding Company Act thus limiting the authority of SEC is as follows:

"Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any com-

quire any change in the corporate structure or existence of any company which is not a holding company, "except for the purpose of fairly and equitably distributing voting power among the security holders of such company." As has been noted, the Springfield Company has never been a holding Company (Par. 11, R. 53); and, after sale of the common stock of the Springfield Company by Federal to the City, the Springfield Company was no longer a subsidiary of a holding company and SEC no longer had even indirect jurisdiction and control over the Springfield Company.

In the *Central-Illinois case, supra,* SEC determined the "investment value" of the preferred stock of Engineers Public Service Company, a registered holding company under the Act. In view of the limitation in Section 11(b)-(2) upon the authority of SEC as to any company which is not a holding company, it would seem that SEC would not have had jurisdiction to make any finding with respect to "investment value" of the preferred stock of the Springfield Company upon liquidation, dissolution or winding up of that corporation, *even if* such finding had been sought. However, it is unnecessary for us to speculate about what might or might not have been done by SEC. The plain, inescapable and indisputable fact in this case is that nothing was done by SEC with respect to the corporate structure of the Springfield Company, liquidation or dissolution of the Springfield Company, or retirement or valuation of its preferred stock.

Counsel for petitioners complain (Pet. 2) that the Springfield Company is being liquidated "by applying thereto the charter provision of the Springfield Gas and

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pany which is not a holding company, or of any company, whose principal business is that of a public-utility company." 15 U. S. C. A., Sec. 79k(b)(2).

Electric Company instead of Section 11(b)(2) of the Public Utility Holding Company Act." But, the Holding Company Act plainly contemplates and requires that whatever action may be taken under Section 11 thereof will follow "notice and opportunity for hearing" and thus will reflect "the Commission's expert judgment on the very technical and complicated matters to deal with which the Commission was established" (*SEC* v. *Central-Illinois Securities Corp.*, 93 L. Ed. l. c. 1307).

We submit that there is nothing in the Holding Company Act or in any of the cases which have arisen thereunder, including the Otis, North American and Central-Illinois cases, to justify or permit the conclusion, which petitioners seek to reach, that the Holding Company Act has invested the Circuit Court of Greene County, Missouri, in the first instance and as a matter of original jurisdiction, and the Supreme Court of Missouri upon appeal, with any jurisdiction, power or authority to fix, determine or pass upon the "investment value" of the preferred stock of the Springfield Company. In all of the reported opinions of federal courts in cases arising under the Holding Company Act, the initial action of SEC was being reviewed in the courts in orderly fashion and in the manner contemplated by the Congress and specifically provided in the Holding Company Act. During the period of more than four years since institution of this litigation, counsel for petitioners have cited no case, and we have found none, in which any state court has undertaken to cut across charter provisions, to apply "the doctrine of equitable equivalents," and to determine the "investment value" of stock under the Holding Company Act.

The petition for writ of certiorari abounds in immaterial, misleading and erroneous statements, apparently injected with the hope that some feeling might be engendered.

We will not prolong this discussion by attempting to single out and answer all of those misleading and erroneous statements, but certain of them perhaps should not be permitted to pass unchallenged. Counsel state (Pet. 23) that the sale agreement shows "that up to the date of closing that Federal was willing to retire the preferred stock at par and the additional call price of $15.00 per share." We respectfully submit that the sale agreement shows no such thing and justifies no such conclusion. Simple perusal of Paragraph Second of the sale agreement (R. 75) will show that stockholders of the Springfield Company, either common or preferred, are not mentioned as such. There is no statement in Paragraph Second about "the value" of the preferred stock of the Springfield Company, and there is no direction or agreement that either $100.00 per share or $115.00 per share should be paid to the preferred stockholders of the Springfield Company. In fact, Paragraph Second is altogether silent as to what the City should do with monies deducted.

In the preamble of the sale agreement, the parties evidenced a desire "to make provision for the contingencies connected with said offer" to purchase the Springfield Company (R. 74); and, as the Supreme Court of Missouri said (R. 172), "the parties to the contract had a right to protect themselves against the very contingency which arose, that is, the claim of certain preferred stockholders for the payment of a premium on their stock," which protection was afforded by deducting the sum of $169,290.00 and placing it in escrow pending termination of this litigation.

In at least four places (Pet. 3, 17, 18, 24), petitioners' counsel refer to Federal receiving "a windfall." Although Federal is not a party to this suit, we submit that to obtain what the Articles of Agreement provide upon dissolution,

liquidation and winding up of the Springfield Company is not to receive "a windfall." Furthermore, counsel well know that Federal also is being liquidated and that any monies which otherwise might have accrued to Federal upon termination of this litigation would pass to, and be distributed among, Federal's stockholders and their successors.

For similarly obscure and irrelevant reasons, petitioners refer at least four times (Pet. 7, 15, 19, 26) to the so-called Teed contract, dated April 22, 1949, which was terminated by agreement of the parties thereto (Pars. 18-21, R. 57). Obviously, the Teed contract could have no possible relevancy to the matter under discussion. It had nothing whatever to do with sale of the common stock of the Springfield Company by Federal to the City. Petitioners' counsel seem to infer that it should be considered as improper or reprehensible that Federal, as the owner of the common stock in the Springfield Company, representing the equity in the properties of that corporation, should have attempted to obtain the best available price for that common stock and the equity represented thereby.

However, such irrelevant comments by counsel do not supply the absent "federal question," which is a jurisdictional requirement for review by this Court. As counsel for petitioners finally admit at the close of their argument (Pet. 26) "the stockholders' rights are not based on a finding of the Commission but upon the liquidation agreement," or in the alternative, as suggested for the first time, upon the escrow agreement. Whether petitioners might recover as third-party beneficiaries under either of those contracts, certainly presents no federal question.

CONCLUSION.

We respectfully submit that, upon the stipulated facts in this record, no federal question was submitted to or decided by the Supreme Court of Missouri; that the opinion of the Supreme Court of Missouri, which petitioners would have this Court review, is not in conflict with the cited decisions of this Court; that the *Otis, North American* and *Central-Illinois cases, supra,* clearly are not applicable or controlling under the admitted facts in this record; and, that petition for writ of certiorari should be denied.

Respectfully submitted,

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